Supreme Court of the United States

OCTOBER TERM 1961

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal from the Supreme Court of Pennsylvania

APPELLANT'S REPLY BRIEF

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The purpose of this Reply Brief is clarification of the issues. This needs to be done because Appellee in its Brief has advanced arguments and theories (answered generally in Appellant's Brief) which, for the most part, were not recognized and relied upon, and which are at variance with the rulings and principles enunciated by the Supreme Court of Pennsylvania.

A. Appellant's Freight Cars

The issue between Appellant and the Supreme Court of Pennsylvania (hereinafter referred to as the state court) is clearly whether appellant's freight cars were habitually employed in Pennsylvania, the domiciliary state, and in other states so that the average unit rule of property tax apportionment applies. The holding of the state court that the rule does not apply is contended by appellant to be contrary (1) to the evidence in the Record and (2) to the decisions of this Court.

In *New York Central and Hudson River Railroad Co. v. Miller*,[1] where the freight cars of a New York corporation were on the lines of other railroads outside of New York, not on regular routes and schedules but designated as "random excursions of casually chosen cars," and in *Northwest Airlines Inc. v. Minnesota*,[2] where the airplanes were run on fixed routes and regular schedules in Minnesota, the domiciliary state, and in seven other Northwestern states, this Court sustained the unapportioned property tax of the domiciliary state on the basis of the home port vessel rule. Under that rule, the units of transportation equipment were held to have a situs at the owner's domicile in the absence of proof that certain specific units—not changing units as under the average unit rule—were *continuously and exclusively outside of the domiciliary state during the whole tax year*.

The state court in the instant case, but not Appellee in its Brief, recognizes that the decision of this Court in *Northwest Airlines* was "all but nullified" (R. 215) by its decision in *Braniff Airways Inc. v. Nebraska State Board*.[3] It recognizes, also, the average unit rule decisions of this Court but it distinguishes them on the basis of regularity of trips or movements,[4] "permanency" in non-domiciliary states,[5]

[1] 202 U.S. 584, 26 S. Ct. 714 (1906).
[2] 322 U.S. 292, 64 S. Ct. 950 (1944).
[3] 347 U.S. 590, 74 S. Ct. 757 (1954).
[4] *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158, 54 S. Ct. 152 (1933); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 19 S. Ct. 599 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149, 20 S. Ct. 631 (1900).
[5] *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S. Ct.

and "almost continuously outside" of domiciliary state.[6] On the basis of these distinctions, it concluded that the tank and refrigerator car cases (Note 4) do not alter the holding in the *Miller* case "in respect to the tax situs of freight cars which are freely interchanged by cooperating railroads:" and, accordingly, it ruled specifically (R. 213, 215, 216) that appellant's freight cars "which move irregularly and continuously about the country * * * do not attain the degree of continual and regularly scheduled presence"—even though *a certain average number may be present in another state* —to permit an apportioned tax by a non-domiciliary state or to prohibit an unapportioned tax by Pennsylvania.

Appellant submits that the ruling of the state court is contrary to the evidence in the Record in the instant case and to the facts and decisions in the average unit rule cases:

1. Operating Agreement:

The state court overlooks the Stipulation of the parties (S/F, Par. 14, R. 50a) that appellant's freight cars while on its lines in Pennsylvania and on the lines of CNJ in New Jersey run on fixed routes and regular schedules as a part of through trains and that the authorities are unanimous that in such case the average unit rule applies.

2. Car Service and Per Diem Agreement:

(a) The state court overlooks and disregards the vital stipulated fact (S/F, Par. 15, R. 50a, 51a) that while off the lines of appellant and CNJ, the entire fleet of 3074 freight cars of appellant was "regularly, habitually and or continuously employed" on lines of other railroads in, in and out, and out of Pennsylvania. Instead, the state court applies its own descriptive terms of "irregular," "indiscriminate," "casual," and "random excursions" to the movement of appellant's cars.

(b) It is, also, stipulated by the parties that a time and use formula of car days indicates that an average of 2189.30

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432 (1949); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905).

[6] *Standard Oil Co. v. Peck*, 342 U.S. 382, 72 S. Ct. 309 (1952).

of appellant's freight cars (71% of time and number) was outside of Pennsylvania during the year (See p. 8 of Appellant's Brief).

(c) The fact of habitual and continuous employment, which is the basis of the average unit rule, exists in the instant case but was absent in the *Miller* case, and, therefore, the *Miller* case is not controlling here. This fact, also, is the basis for the use of the average unit rule to determine the average number of units which is said to be *permanently located* or to have a *permanent situs* in the non-domiciliary states in the *Ott* and *Union Refrigerator* cases cited in Note 5 herein.

(d) Contrary to the state court in the instant case, the fact of regularity of trips and movement did not exist in the two refrigerator car cases cited in Note 4. The trips and movements were irregular and indiscriminate and yet the average unit rule was applied to determine a *small* average number (10 and 40) to be taxable by the non-domiciliary state. In the *Johnson Oil* case (Note 4), the tank cars were reloaded on the average of once a month in Oklahoma and an average of 16% were in Oklahoma and the remaining 84% were in transit outside the state.

(e) An analysis of the decisions establishes that when units of transportation equipment are used and employed in several states, the average unit rule applies where a reasonable time and use formula determines that an average number of units are present within a non-domiciliary state[1] or are *not* present in, or are without, the domiciliary state.[2]

These reasons warrant reversal of the state court's ruling sustaining the unapportioned tax on apellant's freight cars in both situations.

Several contentions advanced in Appellee's Brief are answered as follows:

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[1] Cases cited in Notes 31-36 of Appellant's Brief.

[2] Cases cited in Note 37 of Appellant's Brief.

1. It represents (pp. 2 and 3) that an exemption is involved and the tax statute should be strictly construed when requiring the listing of tangible personal property "permanently located outside of the state." This is clearly in error since the state court has held that a constitutional deduction and not an exemption is involved.[9]

2. In disregard of the Stipulation of the parties that appellant's freight cars were habitually employed outside the state, appellee in its statement of Questions Presented (p. 4) refers to them as "temporarily outside".

3. Appellee contends (pp. 42-47) that because of the basis of computation of compensation to the owner, appellant's freight cars on the lines of CNJ under the Operating Agreement have the same status as those of its cars on the lines of other railroads under the Car Service and Per Diem Agreement. It is difficult to conceive how the rate of compensation affects the legal significance of stipulated use on regular routes and schedules.

4. Appellee contends (pp. 36-42 of its Brief) that the car day ratio is not a valid test to determine the location of appellant's cars. This ratio was introduced into the Record by Stipulation of the parties and Exhibits thereto (S F, Par. 15, Exhibits Y-1 to Y-6 inclusive, R. 50a, 51a, 130a-144a) without objection by appellee and therein are set forth the names of railroads, *their locations* and the number of car days on each. Appellee's contention is based upon forced statistics and assumptions, not in the Record, which disregard numbers of car days on, and location of, individual railroads as shown in the Record. The car hire ratio, which is the equivalent of the car day ratio, was approved by this Court in *Union Refrigerator Transit Co. v. Kentucky*.[10]

5. Appellee (pp. 22-31 of its Brief), but not the Supreme Court of Pennsylvania, distinguishes some, but not all, of

[9] *Com. v. Westinghouse Air Brake Co.*, 254 Pa. 12, 14, 95 A. 807 (1915).

[10] 199 U.S. 194, 26 S. Ct. 36 (1905).

the average unit rule cases upon the ground that the owners were employing the transportation equipment in their business whereas appellant's freight cars under per diem rental were employed in the business of the using railroads. This distinction is without foundation and is invalid.

The tax at issue is not a tax upon appellant for the privilege of doing business. It is a tax on property and the jurisdiction to levy such a tax, or a tax on income from property, is physical presence and employment within the state whether by owner or another.[11]

Appellant, by membership in the Association of American Railroads, is a part of the integrated railroad system in the United States. A part of its business is the interchange of its freight cars and the receipt of compensation therefor. It is just as much engaged in business where its cars are employed as are the tank and refrigerator car owners.

Private car companies *and railroads* own tank and refrigerator cars and compensation for their use over railroad lines is the same per diem rental of $1.75 as for appellant's freight cars, or at the option of the owner or controlling company (usually a railroad), a mileage rate. (8 F, Par. 13, R. 49a, 50a, Exhibit X, Code of Per Diem Rules—Freight, Rule 1(b) and 1(c)). These cars are interchanged. This fact does not affect application of average unit rule to determine property tax liability in states where used and operated.[12]

B. Discrimination

Appellee (pp. 48-50 of its Brief) denies discrimination against appellant on two grounds: (1) consolidation of railroads with charters in more than one state with inference that only such railroads were allowed exclusion from tax

[11] *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 19 S. Ct. 599 (1899); *Oklahoma Tax Commission v. American Refrigerator Transit Co.*, 349 P. 2d 746 (1959); *Com. v. American Bell Telephone Co.*, 129 Pa. 217, 18 A. 122 (1889); *Annotation*, 49 A.L.R. 1103.

[12] *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 82, 19 S. Ct. 599 (1899).

of their freight cars while on lines of other railroads, and (2) imperfect knowledge in tax reports and mistake or error by tax authorities.

The first ground is not a fact of record. There are many railroads with Pennsylvania Charters only which have railroad trackage extending beyond the state, some of which are the Pennsylvania Railroad, the Delaware, Lackawanna and Western Railroad and the Lehigh Valley Railroad;[1] and it is stipulated by the parties (S. F. Par. 25, R. 54a, 55a) that *all* railroads with trackage outside were allowed the exclusion from tax for their freight cars while on the lines of other railroads.

Appellee's second ground is irrelevant and immaterial. The state court has denied discrimination on the ground of classification in the statute between railroads with no trackage outside of the state and those with trackage outside. Appellee is bound by, and must defend on the basis of, this construction of the tax statute by the state court. In Appellant's Brief (pp. 39, 40), this classification is shown to be invalid.

C. Conclusion

Appellant submits that the discussion in this Reply Brief supports its conclusions and prayers to this Court as set forth in its Brief (pp. 42, 43).

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[1] 297 Pa. 308, 147 A. 242 (1929); 145 Pa. 96, 22 A. 157 (1891); 145 U. S. 192, 12 S. Ct. 806 (1892).